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No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

MICHAEL C. MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a criminal limitations period be "suspended" pursuant to 18 U.S.C. §3292 in a prosecution involving offenses which allegedly occurred well prior to section 3292's enactment, where Congress, consistent with its long-standing policy in favor of repose, did not give retrospective effect to section 3292?

2. Does 18 U.S.C. §3505, which allows for the admission of hearsay in the form of business records from foreign countries on conclusory affidavits and without live testimony from the custodian of the records or any other individual, violate the Confrontation Clause of the Sixth Amendment?

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Michael C. Miller respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on October 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals in this case is reported as *United States v. Michael C. Miller*, 830 F.2d 1073 (9th Cir. 1987), and is attached hereto as Appendix A at pp. A1-A10. No written opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 22, 1987. This petition for certiorari was filed within 60 days of that date, and is therefore timely. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves sections 3282, 3292, and 3505 of Title 18 of the United States Code. The statutes are set forth in their entirety in Appendix B.

STATEMENT OF THE CASE

A. The Indictment

On April 3, 1986, a four-count indictment was returned against Michael C. Miller, alleging that Mr. Miller had schemed to defraud a Mr. John Louis Paanakker of the proceeds of an inheritance received by Mr. Paanakker in 1980.[1] Mr. Miller allegedly gained possession of Paanakker's inheritance proceeds and deposited the money in a bank in Grand Cayman, and thereafter transferred the money to banks in Austria and Switzerland.

Count one of the indictment, to which Mr. Miller subsequently entered a conditional plea of guilty, charged that on October 8, 1980 (more than five years prior to the return of the indictment), Mr. Miller caused the transmission of a wire communication in violation of 18 U.S.C. §1343 (wire fraud) in transferring monies by wire from Los Angeles to a Cayman Islands bank in furtherance of the alleged scheme. The remaining counts also alleged related conduct occurring in 1980.

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[1]The jurisdiction of the district court was invoked pursuant to 18 U.S.C. §3231.

B. The Government's Attempts To Extend The Statute Of Limitations

On July 16, 1985, the government applied *ex parte* and *in camera* for an order from the district court to "suspend" the running of the statute of limitations pertaining to the offenses allegedly commited by Mr. Miller. The application was purportedly brought pursuant to 18 U.S.C. §3292, which had been enacted on October 12, 1984, and which had become effective on November 12, 1984. 98 Stat. 2167, §§1218(a) and 1220.

The government's application indicated that evidence relevant to the offenses under investigation had been located in and obtained from two foreign countries. Specifically, the application indicated that an official request to the government of the Cayman Islands for evidence there had been made on September 9, 1983, and that the Caymanian government had taken final action in compliance with the official request on February 13, 1984. The application similarly indicated that an official request for evidence had been made to the Austrian government on July 25, 1984, with final action by the government of Austria completed on November 28, 1984. The July 16, 1985, application sought, and the district court issued, an order "suspending" the running of the limitations statute for the periods of time during which the official requests for evidence from the Cayman Islands and Austria had previously been pending.

On November 20, 1985, the government made a second application for an order suspending the running of the statute of limitations. This application indicated that an official request for evidence had been made to the government of Switzerland on February 22, 1985, and

that the request was granted by Swiss authorities on August 26, 1985. The November 20, 1985, application sought, and the district court issued, an order "suspending" the running of the statute of limitations for the time period during which the request to the Swiss government previously had been pending.

The government thus obtained an extension of the limitations period totalling approximately one year and five months.

C. The Government's Intent To Offer In Evidence Records Obtained From Businesses Located In The Cayman Islands, Austria, And Switzerland

After Mr. Miller's indictment and prior to the date set for trial, the defense received notice from the government that it intended to offer in evidence, pursuant to 18 U.S.C. §3505, foreign business records against Mr. Miller at trial. Specifically, the government sought to introduce records and business documents from banks located in the Cayman Islands, Austria, and Switzerland. Apparently, the prosecution would have attempted to establish at trial through the admission of these foreign business records that Mr. Miller knowingly and intentionally devised and carried out the alleged scheme to defraud John Louis Paanakker.

The documents purportedly obtained from these foreign business entities were allegedly "authenticated" in compliance with section 3505 by means of affidavits supposedly reflecting the statements of an employee or representative of each of the foreign business entities. The affidavits contain (as translated) a bare recitation of the language of the business records exception to the federal hearsay rule, Fed.R.Evid. 803(6), as incorporated in section 3505. No further authentication or foundational information is set forth in the affidavits.

The foreign records produced by the government were voluminous, and would have constituted the primary or sole evidence at trial of the alleged final disposition of the funds in issue.

D. The Post-Indictment Proceedings In The District Court

Prior to the date set for trial, Mr. Miller's counsel filed two motions, a Motion to Dismiss the Indictment As Being Time-Barred, and a Motion to Exclude Evidence Pursuant to 18 U.S.C. §3505. A hearing on the motions took place on October 20, 1986, wherein the district court summarily denied the motions in an oral ruling from the bench.

Mr. Miller subsequently withdrew his "not guilty" plea and entered a conditional plea of guilty to count one pursuant to Rule 11 of the Federal Rules of Criminal Procedure. A written reservation of Mr. Miller's right to appeal the primary issues raised in the above-described motions was later filed and approved by the court.

On March 9, 1987, the district court sentenced Mr. Miller to imprisonment for a period of two years. A timely notice of appeal was filed by Mr. Miller on March 11, 1987.

On October 22, 1987, the Court of Appeals for the Ninth Circuit filed its judgment and opinion affirming the district court's ruling and Mr. Miller's conviction. [*United States v. Miller*, 830 F.2d 1073 (9th Cir. 1987); Appendix A, pp. A1-A10.] The Court of Appeals held that section 3292 was "in effect" when the district court suspension orders were entered, and that the district court thus properly "applied the law in force." [*Id.*, Appendix A, pp. A5-A6.]

With respect to the argument that section 3505 violates the Confrontation Clause, the Court held that the records at issue bore indicia of reliability, and that section 3505 was therefore constitutional as applied in Mr. Miller's case. [*Id.*, Appendix A, p. A10.]

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With The Longstanding Congressional Policy Of Repose And With Prior Federal Court Decisions Relating To Criminal Statutes Of Limitation

The indictment in this case was returned and filed on April 3, 1986, more than five years after the dates on which it alleges that the defendant violated federal law. Thus, it would appear from the face of the indictment that the prosecution of the offenses alleged therein was barred by the five-year statute of limitations, 18 U.S.C. §3282. The government, however, relied on 18 U.S.C. §3292 as a statutory vehicle to extend section 3282's five-year limitation period. Section 3292 was enacted on October 12, 1984, and became effective on November 12, 1984. 98 Stat. 2167, §§1218(a) and 1220. Because Congress chose not to give it retrospective effect, section 3292 may not be applied to criminal offenses committed prior to November 12, 1984, section 3292's effective date. The Court of Appeal erred in concluding otherwise.

At the outset, it bears emphasis that the tardy prosecution of stale offenses in this case raises questions concerning the proper interpretation and application of a federal statute of limitations. To resolve these questions, one must perforce ascertain the congressional policy underlying the two federal statutes at issue, 18 U.S.C. §§3282 and 3292. The inquiry, however, need not be conducted in a vacuum. Our federal courts have long recognized that Congress has adopted, manifested, and adhered consistently to an express and unequivocal policy in its legislation of statutes and periods of limitation—a policy of repose.

The function of statutes of limitation is to limit an individual's exposure to criminal prosecution "to a *certain fixed period of time* following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Toussie v. United States,* 397 U.S. 112, 114, 90 S.Ct. 858, 860 (1970) (emphasis supplied). Limitation statutes "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *United States v. Marion,* 404 U.S. 307, 322 n.14, 92 S.Ct. 455, 464 n.14 (1971). A statute of limitations, such as 18 U.S.C. §3282, reflects Congress's prior balancing of "the government's need for a fair chance to initiate a prosecution against the travail of a defense founded on evidence faded by the passage of years." *United States v. Laut,* 17 F.R.D. 31, 36 (S.D.N.Y. 1955).

The temporal limitation imposed by Congress is designed in part to protect individuals from having to defend against charges when facts may have become obscured by the passage of time and to minimize the danger of official punishment for acts occurring in the far-distant past. *Toussie*, 397 U.S. at 114, 90 S.Ct. at 112. In addition, such time limits properly encourage law enforcement to investigate suspected criminal activity in a prompt fashion. *Id.*

For these and other reasons, a statutory limitations period is "fundamental" to our notion of a civilized society and its criminal law. *Bridges v. United States,* 346 U.S. 209, 215-16, 73 S.Ct. 1055, 1059 (1953); *see* 16 Ohio State Law Journal 130, 135-137 & 138 (1955). Thus, it has been long and well established that criminal limitations statutes are "to be liberally interpreted in favor of repose." *United States v. Marion, supra,* 404

U.S. at 322 n.14, 92 S.Ct. 455, 464 n.14; *Toussie, supra,* 397 U.S. at 114-15, 90 S.Ct. at 860; *United States v. Scharton,* 285 U.S. 518, 521-22, 52 S.Ct. 416, 417 (1932); *United States v. Richardson,* 393 F.Supp. 83, 87 (W.D.Pa. 1974), *aff'd.,* 512 F.2d 105 (3d Cir. 1975); *United States v. Gross,* 159 F.Supp. 316, 317 (D.Nev. 1958); *United States v. Laut, supra,* 17 F.R.D. at 36.

Moreover, in crafting the language of 18 U.S.C. §3282 as it did, Congress manifested its strict adherence to its "long-standing congressional policy of repose." *United States v. Laut, supra,* 17 F.R.D. at 36, *quoting Bridges v. United States,* 346 U.S. 209, 215-16, 73 S.Ct. 1055, 1059 (1953). That policy, as succinctly stated by Congress, is that the 5-year limitation period of 18 U.S.C. §3282 may not be extended or avoided "[e]xcept as otherwise expressly provided by law." *Toussie, supra,* 397 U.S. at 115, 90 S.Ct. at 860, *quoting and interpreting* 18 U.S.C. §3282; *United States v. Richardson, supra,* 393 F.Supp. at 87.

It is also important to note that, as a general rule, "[a] law is presumed to operate prospectively unless there is a clear expression to the contrary." *Hassett v. Welch,* 303 U.S. 303, 314, 58 S.Ct. 559 (1938); *see De Roduffa v. United States,* 461 F.2d 1240, 1247 (D.C. Cir. 1972).

> One of the first rules of statutory construction is that legislation must be considered as addressed to the future, not the past. Retroactive operation will not be given to a statute unless such is the manifest intention of the legislature.

Puget Sound Power & Light Co. v. F.P.C., 557 F.2d 1311, 1314 (9th Cir. 1977). Stated differently, there is a presumption of prospective application which may be

overcome only "where Congress has clearly and unambiguously indicated that the statute is retroactive." *Soria v. Oxnard School District Board of Trustees,* 467 F.2d 59, 60 (9th Cir. 1972); *accord, Greene v. United States,* 376 U.S. 149, 160-161, 84 S.Ct. 615, 621-622 (1964).

Of course, the law at issue in this case is one affecting the limitations period applicable to criminal cases. As noted above, such a statute must be interpreted "in favor of repose." *Toussie, supra,* 397 U.S. at 115, 90 S.Ct. at 860. Indeed, the statute of limitations applicable to the offenses charged here, 18 U.S.C. §3282, declares that its 5-year limitations period may not be extended "[e]xcept as otherwise *expressly* provided by law." (Emphasis supplied). *A fortiori,* a law such as section 3292, which serves to extend section 3282's limitations period, may not be construed to apply retrospectively absent, at the very least, a clear and unambiguous expression of congressional intent that it be so applied. *United States v. Richardson, supra,* 393 F.Supp. at 87 and 512 F.2d at 106. The legislative history of section 3292 is silent on whether the statute is to apply to offenses occurring before its enactment. In short, Congress has expressed no intention, clearly or otherwise, that section 3292 be applied retrospectively.

Significantly, Congress has not hesitated in the past to state clearly and unambiguously its intention that a new law extending a criminal limitations period be applied retrospectively where, in fact, such was Congress's intent. See 42 Stat. 220, ch. 124, §1; 68 Stat. 1145, §1. In light of these prior, explicit expressions of retrospective application, Congress's silence here becomes even more compelling.

In sum, congressional policy, well-established rules of statutory construction, specific rules of interpretation

pertaining to criminal limitations periods, and the express language of 18 U.S.C. §3282, support, without exception, petitioner's argument: Section 3292 has no application with respect to offenses alleged to have been committed prior to its effective date, November 12, 1984. The Court of Appeals nonetheless adopted a contrary view based on a legal theory that has no relevant application to the issue raised.

In its opinion, the Court of Appeals analyzed and purported to resolve the issue as follows:

> The new statute was not applied by the district court retroactively. The statute was in effect when the district court orders were entered suspending the statute of limitations. The district court simply applied the law in force. *See Bradley v. Richmond School Board,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974).

[*United States v. Miller, supra,* Appendix A, pp. A5-A6.] The Court's observation that section 3292 "was in effect" when the suspension orders were entered merely begs the question. The fact that a statute has an "effective date" does not in itself control whether it may be properly applied to all cases pending or initiated after that date. Otherwise, literally every statute would necessarily have retrospective application simply by virtue of its effective date. The relevant question remains: Was section 3292 intended to apply in cases involving acts or conduct occurring prior to the statute's effective date? If not, then the statute perforce cannot be so applied, irrespective of whether it was "in effect" when the government sought to utilize it.

In this regard, the Court of Appeals' apparent reliance on *Bradley v. Richmond School Board, supra,* is

misplaced. In *Bradley*, the district court had awarded attorney's fees under common law theories to compensate counsel for a portion of their efforts in a lengthy desegregation case. While the propriety of the fee award was pending resolution on appeal, Congress enacted a statute explicitly authorizing such fee awards. This Court affirmed the district court's order awarding attorney's fees, observing, *inter alia*, that the legislative history of the new statute supported its retrospective application to pending cases. 416 U.S. at 716 & n.23, 94 S.Ct. at 2018 & n.23. Significantly, the Court made it painstakingly clear that neither its prior decisions nor its decision in *Bradley* "purports to hold that courts must always apply new laws to pending cases." 416 U.S. at 715, 94 S.Ct. at 2018. Indeed, the *Bradley* decision cites with approval those cases where courts discerned and followed a legislative direction to apply a "new law" prospectively only. 416 U.S. at 715 n.21, 94 S.Ct. at 2018 n.21.

The decision below thus stands the relevant law on its head and creates a dangerous precedent in an area of critical importance. As discussed above, this Court has repeatedly held that criminal limitations statutes are to be liberally interpreted in favor of repose, *Toussie, supra,* 397 U.S. at 115, 90 S.Ct. at 860 (and cases cited therein), and has recognized that this "long-standing congressional 'policy of repose' . . . is fundamental to our society and our criminal law." *Bridges, supra,* 346 U.S. at 216-17, 73 S.Ct. at 1059. Persons who might otherwise be subject to prosecution are not the only beneficiaries of this policy of repose. As one commentator has aptly stated:

> [I]t is suggested that the "repose" which statutes of limitations are designed to assure is that of persons other than . . . defendants

> to particular actions. The word "society" may be used for identification. Although society properly may be interested in the welfare of an individual, as such, it is clear that the interest referred to here is that of those persons who have dealings with others and, accordingly, are concerned in the stability of the positions of those with whom they deal. Without this stability there would be little repose for anyone.

Callahan, *Statutes of Limitation—Background*, 16 Ohio State L.J. 130, 136 (1955). In light of the steady increase in the number of prosecutions involving evidence located abroad (see H.R. No. 98-907, 98th Cong., 2d Sess., (1984), *reprinted in* 98 U.S. Code Cong. & Admin. News at 3578), it can reasonably be expected that the negative impact upon society will similarly increase as a result of the Court of Appeals' derogation of the policy of repose.

Finally, the decision below directly conflicts with the view adopted by the Third Circuit, which has held that a law operating to extend the criminal limitations period of 18 U.S.C. §3282 is not to be applied to offenses committed prior to the law's effective date absent a clear expression of congressional intent. *United States v. Richardson, supra,* 393 F.Supp. 83 (W.D.Pa. 1974), *aff'd.*, 512 F.2d 105 (3d Cir. 1975).

In *Richardson*, the defendant was charged with failing to register for the draft. Under the then-recent, 1970 Supreme Court decision in *Toussie v. United States*, the 5-year limitations period of 18 U.S.C. §3282 began to run "when dawn breaks on the unregistered male, six days after his 18th birthday." 397 U.S. at 123, 90 S.Ct. at 864. In 1981, in response to the decision in *Toussie*, Congress enacted 50 U.S.C. App. §462(d) which

declared that the 5-year limitation period would begin to run on a potential registrant's 26th birthday or on the day that such person did in fact register for the draft, whichever comes first. Congress did not explicitly provide for the retrospective application of this law extending the limitations period. 85 Stat. 352.

The defendant Richardson turned 18 on September 7, 1968. Under *Toussie*, the 5-year limitations period began to run 6 days later, on September 13, 1968. This limitations period had not yet run when Congress extended the limitations period by enacting section 462(d) on September 28, 1971. The defendant Richardson was subsequently indicted on March 7, 1974. Thus, in *Richardson*, as here, the indictment would be time-barred by 18 U.S.C. §3282 if the "new" law extending the limitations period was not to be applied retrospectively. Conversely, the indictment would have been timely-filed if the "new" law were to be given retrospective effect.

The district court in *Richardson* refused to construe section 462(d) to apply to offenses committed prior to its effective date, despite the government's argument that Congress's explicit rejection of the *Toussie* decision mandated retrospective application. After a thorough and thoughtful analysis of the law, the district court held:

> In the absence of a clear statement from Congress that it intended retrospective application of the extended statute we do not think we should extend it by judicial order.

393 F.Supp. at 87. On appeal, the Third Circuit affirmed on the basis of the district court's "well-reasoned opinion." *United States v. Richardson, supra*, 512 F.2d at 105. The Court correctly noted at the outset that

"[t]he question is one of ascertaining congressional intent," and held:

> The language of section 462(d) is silent on this point. Although the legislative history of the statute indicates that Congress wished to overcome the decision in *Toussie*, it does not indicate, contrary to the Government's contention, whether the new statute of limitations is to apply to offenses occurring before the statute's enactment. We therefore hold that section 462(d) applies only to offenses committed after September 28, 1971.

Id. at 106. The Third Circuit thus gave effect to Congress's policy favoring repose. The decision below is directly at odds with Third Circuit's holding in *Richardson*, and represents a marked departure from the longstanding congressional policy of repose as understood and applied by our federal courts.

B. The Decision Below Upholding The Constitutionality Of 18 U.S.C. §3505, Which Allows For The Admission Of Hearsay Evidence Based On Ex Parte Affidavits, Conflicts With Fundamental Rights Guaranteed By The Confrontation Clause And Raises An Important New Question Of Federal Law

In an effort to "make foreign-kept business records more readily admissible into evidence in criminal trials in United States Courts" [H.R. No. 98-907, *supra*], Congress in 1984 enacted 18 U.S.C. §3505. Section 3505 allows for the admission of hearsay evidence in the form of foreign business records based on conclusory affidavits from unknown and unseen foreign individuals. In pertinent part, the statute provides as follows:

> (a)(1) In a criminal proceeding in a court of the United States, a foreign record of

regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that—

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

18 U.S.C. §3505. By eliminating the requirement of Federal Rule of Evidence 803(6),[2] that the live, in-court

[2]Fed.R.Evid. 803(6) provides that the following is not excluded by the hearsay rule even though the declarant is available as a witness:

(6) Records of regularly conducted activity

A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

testimony of a "custodian of records or other qualified witness" is necessary to establish, *inter alia*, the accuracy and authenticity of the business records, section 3505 thoroughly eviscerates the constitutional right of confrontation.

The Sixth Amendment to the United States Constitution provides that the defendant in all criminal cases has the right "to be confronted with the witnesses against him." U.S. Const., Amend. VI. The fundamental interest secured by the Confrontation Clause is the right to cross-examine adverse witnesses. *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076 (1965). As this Court stated in *Mattox v. United States*:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits *** being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

156 U.S. 237, 242-43, 15 S.Ct. 337, 339 (1895).

This Court has repeatedly emphasized that the Sixth Amendment expresses a marked preference for the face-to-face confrontation of an adverse witness—by the defendant and his counsel and by the jury. *See Douglas v. Alabama, supra,* 380 U.S. at 418, 85 S.Ct. at 1076; *Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537 (1980); *California v. Green*, 399 U.S. 149, 157, 90 S.Ct.

1930, 1934 (1970); *Barber v. Page,* 390 U.S. 719, 725, 88 S.Ct. 1318, 13232 (1968). The ability of a defendant to cross-examine a witness is so important that "the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process'." *Ohio v. Roberts, supra,* 448 U.S. at 64, 100 S.Ct. at 2538 *quoting Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046 (1973) and *Berger v. California,* 393 U.S. 314, 315, 89 S.Ct. 540, 541 (1969).

Section 3505 allows precisely what the Constitution and the decisions of this Court have condemned—the admission of *ex parte* affidavits against the accused with the concomitant denial of the accused's fundamental right to fully and effectively cross-examine the witnesses against him, to compel the witness to stand face-to-face with the jury, and to insure that the jury will observe the demeanor of the witness in order to assess the believability and worth of such testimony.[3]

The Confrontation Clause does not, of course, mandate the exclusion of all hearsay testimony. *Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537 (1980). The admissibility of hearsay evidence, however, has previously been carefully limited to comport with the core values of the Confrontation Clause. Thus, "the overriding concern of the Advisory Committee [in drafting the Federal Rules of Evidence regarding hearsay] was that the rules be formulated so as to avoid impinging upon a criminal defendant's right to confront the witnesses against him." *United States v. Oates,* 560 F.2d 45, 68 (2d Cir. 1977).

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[3]It is revealing that shortly after section 3505 was enacted, the statute's susceptibility to attack on confrontation grounds was noted. *See* Degnan, *Obtaining Witnesses and Documents (Or Things),* 108 F.R.D. 223, 231 (1985).

For example, Rule 803(6), the business records exception, provides a reasonably acceptable substitute for the specific authentication by the maker of every entry in every business record sought to be admitted at trial. *Phillips v. United States,* 356 F.2d 297, 307 (9th Cir. 1965), *cert. denied,* 384 U.S. 952, 86 S.Ct. 1573 (1966). The drafters of Rule 803(6) retained the minimal Sixth Amendment safeguard of requiring that a "qualified witness" personally testify and thus be available for cross-examination as to the records' reliability, the trustworthiness of the source of the information contained in the records, and the trustworthiness of the method or circumstances of the records' preparation. The importance of this provision lies in the fact that it insures the presence of some individual at trial who can testify, at the very least, to the methods of keeping information. *N.L.R.B. v. First Termite Control CO.,* 646 F.2d 424, 427 (9th Cir. 1981).

> Without cross-examination on the keeping of the records, the trier of fact would have no rational basis on which to evaluate the accuracy of the record, and therefore the trustworthiness of the evidence. Thus "[t]he testimony of the custodian or other qualified witness who can explain the record keeping of his organization is ordinarily essential."

Id. (*quoting* 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, par. 803(6)[02] at 151-52).

Other Circuit Courts have also expressed the importance of the custodian's live testimony: "Such testimony establishes the regular practices and procedures surrounding the creation of the records, the very elements that are necessary for a finding of trustworthiness." *United States v. Wables,* 731 F.2d 440, 449 (7th

Cir. 1984). Under Rule 803(6), it has been assumed that the availability of a live witness for cross-examination would sufficiently ensure an opportunity to test the trustworthiness of the proffered records:

> Thus if there were serious questions about the reliability of any given . . . record, the jury would not be deprived of the benefit of cross-examination of a live witness as to the accuracy of the report. The business record exception is only an evidentiary short-cut; where there is a real dispute the jury's ability to make an informed determination may always be protected.

United States v. Smith, 521 F.2d 957, 965 n.19 (D.C. Cir. 1975). In short, where there is no opportunity to cross-examine any qualified witness as to the records, there is necessarily a deprivation of a meaningful opportunity to test the records' reliability or determine the weight to be given them by the trier of fact.

Section 3505, by contrast, authorizes an unprecedented hearsay exception which effectively denies any such opportunity to confront and cross-examine the custodian of records. The procedure authorized by the statute prevents the accused from presenting to the jury any "rational basis" for questioning the accuracy or reliability of the records, the reliability of the records' sources of information, or the trustworthiness of the methods and circumstances of the records' preparation. Such a wholesale deprivation of an accused's constitutional rights flies in the face of Congress's "preoccupation with preserving the confrontation rights of criminal defendants." *United States v. Oates, supra,* 560 F.2d at 69.

It would appear that expediency and cost-cutting are the sole justifications for the statute. The relevant legislative history purports to legitimize the statute on the basis that it "provides a simple, inexpensive substitute for the cumbersome and expensive procedures presently required for the admission of foreign business records." H.R. Rep. No. 5919, 98th Cong., 2d Sess. 4 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3578, 3580. During floor debate in Congress, the new legislation was advocated as a remedy to the "costly and time consuming" foreign deposition procedure previously used. *See* 130 Cong. Rec. H8023, H8024 (daily ed. July 30, 1984) (statement of Rep. Conyers). The perceived value of the new legislation was that it would allow a federal prosecutor to "cut through all the procedural redtape." *Id.* at H8025 (statement by Rep. Gekas).

The perceived need to cut costs and to avoid inconvenience,[4] however, does not constitute the sort of legitimate competing interest or substantial justification which might "outweigh" an accused's right to confront witnesses under the Sixth Amendment:

> [C]onstitutional rights do not turn on the . . . outcome of cost/benefit analyses or the results of economic or fiscal calculations. *** There is no price tag on any . . . constitutionally-provided right.

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[4]Ironically, section 3505's cumbersome requirements with regard to the certification process appear to be as time-consuming as the former practice most commonly used under such circumstances, *i.e.*, the deposing of the custodian in his own country, with defense counsel (and possibly the defendant) present and able to cross-examine. In this case, the necessary certifications for the foreign records were not all received until after the date trial was originally scheduled to begin.

Armster v. United States District Court, 792 F.2d 1423, 1429 (9th Cir. 1986). *Cf. Chambers v. Mississippi, supra,* 410 U.S. at 295, 93 S.Ct. at 1046 (denial of confrontation right to accommodate legitimate competing interest requires that latter be closely examined).

Congress apparently believed that the admission of unreliable evidence under section 3505 was unlikely due to its perception of "the ability of the defendant to challenge [the admission of foreign business records] if the source of the information from which they were made or the method or circumstances of their preparation indicate lack of trustworthiness. . . ." H.R. Rep. No. 5919, *supra, reprinted in* 1984 U.S. Code Cong. & Admin. News at 3580. The very terms of the statute show that this belief was not well-founded, for section 3505 requires only the *barest* of statements from the custodian (essentially parroting the language of the business records hearsay exception) to certify the documents and thereby render them admissible. The defendant is thus faced with an affidavit containing a few terse statements and *de facto* legal conclusions. Notwithstanding the apparent belief of Congress, the accused has *no* opportunity to inquire into "the source of the information from which [the records] were made or the method or circumstances of their preparation. . . ." *See id.* A defendant is forced to rely entirely on the credibility and diligence of an unknown and unseen employee of the business in question to insure that the records will be accurate and, equally important, complete.

In essence, in exchange for expedience and economy, 18 U.S.C. §3505 eliminates the very element of Rule 803(6) which maintained its constitutional integrity—the requirement of a face-to-face confrontation with the custodian of records—and replaces it with that which

the Sixth Amendment forbids, namely, the use of *ex parte* affidavits against the accused. As such, 18 U.S.C. §3505 is constitutionally infirm on its face.

The Court of Appeal below held that section 3505 is constitutional as applied in Mr. Miller's case. Referring to the foreign records, the Court stated: "All bear indicia of reliability." [*United States v. Miller, supra,* Appendix at p. A10.] the Court further stated:

> No motive is suggested that would lead bank officials to change, distort, or manipulate the records at issue here. The recordkeepers have, under criminal penalties in their own countries, asserted that the records are records kept in the course of business. Examination of the recordkeepers by counsel for Miller could not reasonably be expected to establish anything more or less than that.

[*Id.*] This language suggests that the right to confront and cross-examine may properly be withheld where an accused is unable to make an independent showing that the proffered evidence is in some way suspect. The court cites no authority for this proposition, and ignores the fact that the burden of establishing trustworthiness of such hearsay evidence lies on the proponent, in this instance, the Government. *See Byrd v. Hunt Tool Shipyards, Inc.*, 650 F.2d 44, 46 (5th Cir. 1981).[5] The court also assumes without any stated basis that examination of the record-keepers would not be fruitful to the defense. This assumption fails to take into account the reality that foreign businesses, and especially foreign banks, often operate under secrecy laws that enable them

---

[5]Indeed, a rule forcing an accused to produce such evidence without benefit of cross-examination would presumably create serious Fifth Amendment dilemmas for defendants in many cases.

to be less than forthcoming in response to official requests for information. See *Foreign Evidence Rules Amendment: Hearing on H.R. 5406 Before the Subcommittee on Criminal Justice of the Committee on the Judiciary,* 98th Cong., 2d Sess. 3, 9-10, 36 (April 25, 1984). (Indeed, many countries attract foreign business precisely because of these laws.) Section 3505, of course, does not abrogate foreign secrecy laws. The court's assumption was unwarranted.

There is little doubt that section 3505 is a convenient weapon for federal prosecutors, and will continue to be utilized in a large number of cases: "With the major advances in transportation, communications, and data processing technology in recent years there has been a concomitant increase in transnational criminal activity affecting the United States, particularly in the areas of narcotics trafficking and large scale fraud." *Hearing on H.R. 5406, supra,* at 13 (testimony of Deputy Assistant Attorney General Mark Richard). The constitutionality of section 3505 will thus be in issue in countless cases. This substantial and important federal question is not adequately addressed in the Ninth Circuit's decision in this case. Plenary review by this Court is necessary.

CONCLUSION

For the reasons stated, it is respectfully requested that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MICHAEL C. MILLER, *Defendant-Appellant.*	No. 87-5092 D.C. No. CR-86-0294-DT OPINION

Argued and Submitted
September 10, 1987—Pasadena, California

Filed October 22, 1987

Before: Cynthia Holcomb Hall, John T. Noonan, Jr. and David R. Thompson, Circuit Judges.

Opinion by Judge Noonan

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

SUMMARY

Criminal Procedure/Evidence

Appeal from conviction. Affirmed.

Appellant Miller convinced one Paanakker to invest his inheritance in Miller's company in the Grand Cayman Islands. The inherited stock was sold and the money given to Miller. Miller told Paanakker that he had wired the money to

the company's account and that bearer bonds had been bought with the money. Later, Miller told Paanakker that a burglar had stolen them from Miller's home. In fact, through a series of transfers, the money was transferred to accounts in Miller's name. Paanakker reported his suspicions. A grand jury investigated and it became necessary to get the records of the foreign banks involved. After all the records were collected, the government applied for and received an order suspending the statute of limitations during two periods which official requests for foreign evidence had been pending. The grand jury returned an indictment and Miller entered a conditional guilty plea.

[1] Miller argues that the new statute, section 3292 of the Comprehensive Crime Contol Act, is not an express provision of law. He invokes the general principles that criminal statutes of limitations are to be interpreted in favor of repose and that a law is presumed to operate prospectively in the absence of a clear expression to the contrary. [2] The statute was in effect when the district court orders were entered suspending the statute of limitations. [3] Miller next contends that the government's application to suspend the statute of limitations under section 3292 must be made while the evidence is still abroad. [4] Congress set no store upon the evidence still being abroad as a precondition for granting the application. [5] Finally, Miller claims that section 3505 of the Comprehensive Crime Control Act violates the confrontation clause. [6] The clause establishes a preference for face-to-face confrontation at trial, but not an absolute requirement that would exclude all hearsay. If the declarant is unavailable, his declaration is not constitutionally inadmissible if it bears indicia of reliability. Here foreign recordkeepers are unavailable. [7] All the records introduced bear indicia of reliability. Admission of business records is an exception to the hearsay rule.

COUNSEL

John S. Crouchley, Los Angeles, California, for the defendant-appellant.

Janet L. Goldstein, Washington, D.C., for the plaintiff-appellee.

OPINION

NOONAN, Circuit Judge:

Michael C. Miller entered a conditional plea of guilty to the crime of wire fraud, 18 U.S.C. § 1343. He reserved his right to appeal on the grounds that the count was time-barred and that evidence admitted under 18 U.S.C. § 3292, whose constitutionality he challenged, should be suppressed. The issues raise new points of law about parts of the Comprehensive Crime Control Act of 1984. Miller's contentions have been vigorously argued and as vigorously answered. We affirm the district court and Miller's conviction.

FACTS

In 1978 Miller, a real estate dealer in Los Angeles, became a friend of John Louis Paanakker, a young man of twenty-one, who had recently moved from Germany to California. Paanakker was about to receive a large inheritance in stocks. Miller convinced him he should invest the inheritance in the Grand Cayman Islands. In July 1980 Miller traveled to the Grand Caymans and set up a company called Humberstone, Hatfield & Co., Inc. (HHC) and opened an account for HHC at the Bank of Nova Scotia Trust Co., Ltd. in the Grand Caymans. Miller told Paanakker that Paanakker would be the only person who could withdraw money from the corporate account; in fact Miller also had authority over the account.

In September 1980 Miller and Paanakker arranged to sell the stock Paanakker had received as an inheritance, realizing $1,135,533 from the sale. Paanakker gave Miller a check in this amount in favor of HHC. Miller told Paanakker that he had wired the money to HHC's account with the Bank of Nova Scotia and that bearer bonds had been bought with the money. In December 1980 Miller told Paanakker that he, Miller, had received the bonds but that a burglar had stolen them from Miller's home. In fact in early October 1980 Miller had sent a cable from California to Barclays Bank International in the Grand Caymans, transmitting the $1,135,533 to his own account. He then instructed Barclays to transfer the money to another account in his name at Creditanstalt-Bankverein, Vienna, Austria. From there the money was transferred at his direction to accounts in his name at Nordfinanz-Bank and Bank Lev, Zurich, Switzerland. Paanakker was of course unaware of these maneuvers but was left without his inheritance.

PROCEEDINGS

In 1982 Paanakker reported his suspicions of Miller to the Federal Bureau of Investigation. A grand jury investigated what had happened to the money, and it became necessary to get the records of the foreign banks involved. On September 9, 1983 the government asked for the records of Barclays and the Bank of Nova Scotia in the Grand Caymans; the request was granted on February 13, 1984. It then became clear that a transfer had been made to the Vienna bank. Its records were requested on July 25, 1985; the request was granted November 28, 1984 and the documents received on December 26, 1984. The transfer to Switzerland then became evident and on February 25, 1985 a request for the Swiss records was made; the request was granted August 26, 1985.

On July 17, 1985 the government applied for an order from the district court suspending the statute of limitations for the nine month period during which official requests for foreign

evidence in the Grand Caymans and Austria had been pending. Under 18 U.S.C. § 3292 the application was granted. On November 20, 1985 the government applied for, and received, a similar suspension for the six month period its request for foreign evidence from Switzerland had been pending.

On April 3, 1986 the grand jury returned a four-count indictment. Miller entered his conditional guilty plea to Count One, charging wire fraud, in the October 8, 1980 wiring of Paanakker's money to his own account. Miller appeals on grounds now to be examined.

ANALYSIS

The Date Section 3292 Became Applicable. On October 12, 1984 Congress enacted the Comprehensive Crime Control Act of 1984, of which 18 U.S.C. § 3292 forms a part. Miller contends that the statute applies only to offenses committed after the date of its enactment. If the statute does not apply, prosecution for Miller for an offense committed in October 1980 is barred because, "Except as otherwise expressly provided by law, no person shall be prosecuted . . . for any offense . . . unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U.S.C. § 3282

[1] Miller's argument is that the new statute, section 3292, is not an express provision of law. He invokes the general principles that criminal statutes of limitations are to be interpreted in favor of repose and that a law is presumed to operate prospectively in the absence of a clear expression to the contrary. *United States v. Richardson,* 512 F.2d 106 (3rd Cir. 1975).

[2] Miller's argument, ingenious as it is, misconceives the issue. The new statute was not applied by the district court retroactively. The statute was in effect when the district court

orders were entered suspending the statute of limitations. The district court simply applied the law in force. *See Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). There was, of course, no "manifest injustice," *see id.*, in the suspension of the statute of limitations to enable the government to catch lawbreakers whose crimes have foreign connections. As for the new statute not being an express provision of law, what could be more express than a statute specifically authorizing a district court to extend the ordinary period of limitations? Miller's attempt to make section 3292 apply only to crimes committed after November 12, 1984 fails.

[3] *Application of Section 3292 After the Foreign Evidence Has Been Recovered.* Miller next contends, with equal ingenuity, that the government's application to suspend the statute of limitations under section 3292 must be made while the evidence is still abroad — that, in other words, the government cannot get the evidence and then apply for the suspension. Miller puts great stress on the words of section 3292(a)(1) "Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense *is* in a foreign country, the district court . . . shall suspend the running of the statute . . . ." 18 U.S.C. § 3292(a)(1)(emphasis supplied).

[4] Miller of course has a point, and if statutory construction could be decided by inspection of a single word, it might even be a winning point. But statutory construction is not so simple. The statute itself specifies the only relevant time the application must be made: "before return of an indictment." *Id.* The statute then goes on to say that the district court shall grant the application if "it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country." *Id.* The "was" here plainly indicates that Congress set no store upon the evidence still being abroad as a precondition for granting the application. Nor would it make sense of the statute to read in such a requirement. The statute makes better sense if it is read as

three district judges here have construed it to let the government file the application after it has sifted the foreign evidence sought. The statute was properly applied to Miller.

The Constitutionality of Section 3505. Finally, Miller attacks the constitutionality of another section of the Comprehensive Crime Control Act, 18 U.S.C. § 3505, which provides as follows:

> (a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that —
>
> (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
>
> (B) such record was kept in the course of a regularly conducted business activity;
>
> (C) the business activity made such a record as a regular practice; and
>
> (D) if such record is not the original, such record is a duplicate of the original; unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
>
> (2) A foreign certification under this section shall authenticate such record or duplicate.
>
> (b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evi-

dence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term —

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the law of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

18 U.S.C. § 3505.

[3] Miller's claim is that the statute violates the Confrontation Clause of the Sixth Amendment. He relies principally on *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984),

cert. denied 474 U.S. 822 (1985) and *United States v. Ordonez*, 737 F.2d 793, (9th Cir. 1984).

[6] The Confrontation Clause establishes "a preference for face-to-face confrontation at trial," but not an absolute requirement that would exclude all hearsay. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). If the declarant is unavailable, his declaration is not constitutionally inadmissible if it bears "indicia of reliability." *Id.* at 65-66.

In *McClintock*, 748 F.2d at 1292, the government failed to show the unavailability of the gem evaluators whose evaluation of quality went to the heart of the case. In *Ordonez*, 737 F.2d at 802, the government could not identify the authors of the ledger entries it sought to rely on and did not show that the authors were unavailable. Here we deal with foreign recordkeepers who are unavailable at trial. *Cf. Mancusi v. Stubbs*, 408 U.S. 204, 212 (1972).

The issue then is whether the bank records here sought to be admitted under section 3505 against the defendant bear the indicia of reliability. The Bank of Zurich records are accompanied by a statement made under criminal penalty for falsity before the Public Prosecutor for the District of Zurich by Charles Zurrer, vice director of the bank. Zurrer certifies the authenticity and accuracy of the records and that they were kept in the ordinary course of business and prepared at or around the time the events occurred by a person familiar with those matters or on the basis of information given by such a person. A similar attestation before the Public Prosecutor was made as to the Bank Lev records by Silvia Fruhwirt, legal assistant at that bank. Similar attestations were made before a magistrate by Eric Cautchey, manager of the Georgetown, Grand Cayman Branch of Barclay's Bank; before a notary public by Frank White, assistant manager of the Bank of Nova Scotia Trust Company (Cayman) Limited; and before a judge of the Criminal District Court of Vienna by

Johannes Kaiser, an employee of the Creditanstalt-Bankverein.

[7] While having the attestation made before a judge or public prosecutor is much to be preferred by reason of its solemnity to the practice of swearing before a notary public, and while a high bank officer is to be preferred to a simple "employee," we do not in this case find reason to distinguish among the records introduced into evidence. All bear indicia of reliability. The admission of business records is a firmly-rooted exception to the hearsay rule. *See Roberts*, 448 U.S. at 66 n.8; *United States v. Bernard S.*, 795 F.2d 749, 755 n.8 (9th Cir. 1986). Firmly-rooted exceptions to the hearsay rule do not offend the Confrontation Clause. *Bourjaily v. United States*, 107 S. Ct. 2775, 2783 (1987).

Banks depend on keeping accurate records and although, as we all know, they err occasionally, their records are among the most common type of business record routinely used in our courts. The novelty of the statute is to admit the records without confrontation by the defendant with the record-keepers. No motive is suggested that would lead bank officials to change, distort, or manipulate the records at issue here. The recordkeepers have, under criminal penalties in their own countries, asserted that the records are records kept in the course of business. Examination of the recordkeepers by counsel for Miller could not reasonably be expected to establish anything more or less than that. If the records were in fact inaccurate, it was within Miller's power to depose the record-keepers and challenge the records. Precedent in and out of this circuit points to admissibility here. *See, e.g., United States v. Leal*, 509 F.2d 127 (9th Cir. 1975); *United States v. Davis*, 767 F.2d 1031-32 (2nd Cir. 1985). As applied in Miller's case to admit foreign bank records kept in the course of business, section 3505 is constitutional.

AFFIRMED

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18 U.S.C. §3282. *Offenses not capital*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

* * *

18 U.S.C. §3292. *Suspension of limitations to permit United States to obtain foreign evidence*

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense—

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

* * *

18 U.S.C. §3505. *Foreign records of regularly conducted activity*

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that—

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term—

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 18, 1987, I served the within *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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Assistant U.S. Attorney
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312 North Spring Street
Los Angeles, California 90012

Solicitor General
United States Department of
Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 18, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)

Supreme Court, U.S.
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CLERK

No. 87-1040

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL C. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly applied 18 U.S.C. (Supp. IV) 3292 to suspend the statute of limitations when the underlying criminal conduct took place before Section 3292 became effective.

2. Whether 18 U.S.C. (Supp. IV) 3505, which permits the authenticity and reliability of foreign business records to be established through a certification completed by the foreign recordkeeper and executed under penalty of perjury, violates the Confrontation Clause of the Sixth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1040

MICHAEL C. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 830 F.2d 1073.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1987. The petition for a writ of certiorari was filed on December 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 3, 1986, petitioner was indicted by a grand jury sitting in the Central District of California. The indictment alleged that petitioner obtained $1,135,533 by fraud and that he laundered the money through banks in the United States, the Cayman Islands, Austria, and Switzerland. He was charged with wire fraud (18 U.S.C. 1343),

two counts of mail fraud (18 U.S.C. 1341), and transportation in foreign commerce of property taken by fraud (18 U.S.C. 2314). On a conditional plea of guilty, petitioner was convicted of wire fraud. He was sentenced to two years' imprisonment and was ordered to pay restitution of $1,135,533. The court of appeals affirmed (Pet. App. A1-A10).

1. In 1978, petitioner befriended John Louis Paanakker, a 21-year old man who had recently moved from Germany to California. Paanakker was about to receive a large inheritance in stocks, and petitioner persuaded him to invest the inheritance in the Cayman Islands. In July 1980, petitioner traveled to the Cayman Islands and set up a company called Humberstone, Hatfield & Co., Inc. He also opened a company account at the Bank of Nova Scotia over which both he and Paanakker would have authority. Petitioner told Paanakker, however, that Paanakker would be the only person authorized to withdraw money from the account. Pet. App. A3.

In September 1980, Paanakker sold his inherited stock and received $1,135,533 for it. Paanakker than gave petitioner a check in that amount drawn in favor of the Humberstone company. Petitioner later assured Paanakker that he had wired the money to the Humberstone bank account, and he represented that bearer bonds had been purchased with the money. In fact, no bearer bonds were purchased, and Paanakker's money was never deposited in the company account. Instead, in early October 1980, petitioner sent a cable to Barclays Bank International in the Cayman Islands transmitting the $1,135,533 to his own account. He then instructed Barclays Bank to transfer the money to his personal account at a bank in Austria. At petitioner's direction, the money was then transferred again to his accounts at two different banks in Switzerland. In December 1980, petitioner told Paanakker that he

had received the bearer bonds, but that the bonds had been stolen when his house was burglarized. As a result, petitioner said, Paanakker had lost his inheritance. Pet. App. A4.

2. After Paanakker reported his suspicions to the FBI in 1982, a grand jury began investigating the transactions. On September 9, 1983, the government made an official request for the records of the Bank of Nova Scotia and Barclays Bank International in the Cayman Islands. That request was granted five months later on February 13, 1984. Based on information revealed by those records, the government then asked for the records of the Austrian bank on July 25, 1984. That request was granted four months later on November 28, 1984, and the records were received on December 26, 1984. Based on the information in those records, the government requested the records of the Swiss bank on February 25, 1985. Six months later, on August 26, 1985, that request was granted. Pet. App. A4.

On the government's application, the district court entered an order on July 17, 1985, suspending the statute of limitations under 18 U.S.C. (Supp. IV) 3292 for the nine-month period during which the official requests for the bank records in the Cayman Islands and Austria had been pending. On November 20, 1985, the district court granted the government's application for another suspension of the statute of limitations for the six-month period during which the request for the bank records in Switzerland had been pending. The grand jury returned its indictment less than five months later on April 3, 1986. Pet. App. A4-A5.

3. After petitioner was indicted, the government notified him that it intended to offer the foreign business records in evidence at trial pursuant to 18 U.S.C. (Supp. IV) 3505. Petitioner moved to exclude that evidence and to dismiss the indictment on the ground that it was barred by

the five-year statute of limitations, 18 U.S.C. 3282. When the district court denied both motions, petitioner entered his conditional guilty plea, reserving the right to challenge the district court's rulings. Pet. App. A5.

4. The court of appeals affirmed (Pet. App. A1-A10). The court first rejected (*id.* at A5-A6) petitioner's argument that the district court improperly suspended the statute of limitations by applying 18 U.S.C. (Supp. IV) 3292 retroactively. It observed (Pet. App. A5) that Section 3292 was enacted as part of the Comprehensive Crime Control Act of 1984 and became effective on November 12, 1984. See 18 U.S.C. (Supp. IV) 3292 note. The court then determined that the tolling provision of the statute "was not applied * * * retroactively," because Section 3292 "was in effect when the district court orders were entered suspending the statute of limitations" (Pet. App. A5-A6). Relying on *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974), the court of appeals explained that "[t]he district court simply applied the law in force" (Pet. App. A6).

The court of appeals also rejected (Pet. App. A7-A10) petitioner's Confrontation Clause attack on the constitutionality of 18 U.S.C. (Supp. IV) 3505, which provides that foreign business records shall not be excluded as evidence by the hearsay rule if the records are accompanied by a specified foreign certification. The court observed (Pet. App. A9) that the Confrontation Clause does not require the exclusion of hearsay of an unavailable declarant if the hearsay bears "indicia of reliability." The court also noted (Pet. App. A9-A10) that all the foreign bank records at issue were accompanied by statements and attestations from bank employees sufficient to indicate their reliability. The court further observed (*id.* at A10) that the admission of business records is one of the firmly

rooted exceptions to the hearsay rule that does not offend the Confrontation Clause.

The court of appeals pointed out (Pet. App. A10) that "[t]he novelty of [Section 3505] is to admit the records without confrontation by the defendant with the record-keepers." It noted (*ibid.*) that "[n]o motive is suggested that would lead bank officials to change, distort, or manipulate the records at issue here." The court went on to conclude (*ibid.*) that the application of Section 3505 to the bank records in this case would not run afoul of the Confrontation Clause because "[t]he recordkeepers have, under criminal penalties in their own countries, asserted that the records are records kept in the course of business" and, "[i]f the records were in fact inaccurate, it was within [petitioner's] power to depose the recordkeepers and challenge the records."

ARGUMENT

1. Petitioner first renews his contention (Pet. 7-15) that the district court erred by applying 18 U.S.C. (Supp. IV) 3292 to suspend the five-year statute of limitations set forth in 18 U.S.C. 3282. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals.

There is no merit to petitioner's argument that the suspension provisions of 18 U.S.C. (Supp. IV) 3292 do not apply if the underlying criminal acts took place before the effective date of Section 3292. In *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974), the Court reaffirmed the long-standing principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary" (*id.* at 711).

As the court of appeals observed, that is what the district court did when it applied Section 3292 to suspend the statute of limitations in this case: it "simply applied the law in force" (Pet. App. A6). It did not apply Section 3292 "retroactively" (*id.* at A5).

Petitioner mistakenly relies (Pet. 7-8, 9) on the general "policy of repose" reflected in the statute of limitations to override the elementary principle that a new law is fully applicable after its effective date in the absence of legislative direction to the contrary. To be sure, the function of a statute of limitations "is to limit [an individual's] exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Toussie* v. *United States*, 397 U.S. 112, 114 (1970). It is well established, however, that Congress may modify or extend a statute of limitations without violating the Ex Post Facto Clause, because changes in a statute of limitations are mere procedural changes. See *United States ex rel. Massarella* v. *Elrod*, 682 F.2d 688, 689 (7th Cir. 1982), cert. denied, 460 U.S. 1037 (1983); *Clements* v. *United States*, 266 F.2d 397, 399 (9th Cir.), cert. denied, 359 U.S. 985 (1959); *Falter* v. *United States*, 23 F.2d 420, 425-426 (2d Cir.) (Learned Hand, J.), cert. denied, 277 U.S. 590 (1928).[1] Likewise, Congress can enact legislation that

[1] For example, in *Clements* v. *United States, supra,* the court rejected the notion that the application of a new statute of limitations to past offenses is, in all instances, a retroactive application of the law. The court held that there was no Ex Post Facto Clause violation because the "amendment was not retroactive in substance or effect" when applied to crimes that were not already time-barred when the law went into effect. 266 F.2d at 399. The court reasoned that because an indictment could have been validly returned at the time the amendment was passed, an extension of the limitations period for the same offense could not be deemed a retroactive law (*ibid.*).

allows a court to suspend a statute of limitations for both pending and future cases. That is what Congress did here.

Petitioner mistakenly contends (Pet. 10, 13) that Section 3292 may not be applied to pending cases involving criminal conduct occurring before that section's effective date, in the absence of an expression of congressional intent that it be so applied.[2] To the contrary, this Court's decision in *Bradley* soundly "reject[ed] the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature" (416 U.S. at 715 (footnote omitted)). Indeed, the Court made it plain that the rule is just the opposite: "a court is to apply the law in effect at the time it renders its decision, unless * * * there is statutory direction or legislative history to the contrary" (*id.* at 711).[3] And as petitioner concedes (Pet. 10), the legislative history does not in any way indicate that Congress intended Section 3292 to be inapplicable to cases involving criminal conduct occurring before the date of its enactment.

Petitioner suggests (Pet. 13-15) that the court of appeals' decision conflicts with *United States* v. *Richardson*,

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[2] Petitioner has never claimed that the suspension provision of Section 3292 violates the Ex Post Facto Clause. Indeed, he conceded before the court of appeals that the issue here is purely a matter of statutory construction: whether Congress intended that Section 3292 be applied in cases where the criminal conduct occurred before the section's effective date. Appellant C.A. Br. 14; Appellant C.A. Reply Br. 4 n.2.

[3] Accordingly, the court of appeals' observation that Section 3292 "was in effect" when the suspension orders were entered does not beg the question, as petitioner argues (Pet. 11). To be sure, the ultimate issue is whether Congress intended Section 3292 to apply in all cases after the effective date of the section. But as the Court made clear in *Bradley*, a statute is to be applied in all such cases unless Congress manifest a contrary intention.

393 F. Supp. 83 (W.D. Pa. 1974), aff'd, 512 F.2d 105 (3d Cir. 1975). There is, in fact, no direct conflict. In *Richardson*, the Third Circuit affirmed the district court's conclusion that a new law changing the commencement date of the statute of limitations for failing to register with the Selective Service System (50 U.S.C. App. 462(d)), was not intended to be applied to offenses committed before the law's effective date. The question decided in the *Richardson* case involved a different statute and thus is only indirectly relevant to the proper interpretation of 18 U.S.C. (Supp. IV) 3292. In any event, *Richardson*'s reasoning is at odds with the principles recognized by this Court in *Bradley*. In *Richardson*, the Third Circuit relied on Congress's silence to create a presumption that Congress did not intend the new law to apply when the offense occurred before the Act's effective date (512 F.2d at 106). The court neither mentioned nor attempted to reconcile that conclusion with *Bradley*. Instead, the court simply relied on the general proposition that a law is presumed to operate prospectively unless there is a clear indication to the contrary (*ibid.*), without explaining how the application of a new statute of limitations to a pending case—a prospective application of the law—runs afoul of that proposition.

2. Petitioner also renews his contention (Pet. 15-24) that 18 U.S.C. (Supp. IV) 3505 violates the Confrontation Clause because the custodian who provides the certification for foreign business records is not subject to cross-examination. That contention is meritless.

Section 3505 was enacted in response to the difficulties encountered by the government in securing the admission of foreign business records at trial. Because the custodians of such records generally are not subject to subpoena, prosecutors cannot compel their presence at trial to authenticate and provide foundational testimony for the admission of foreign records. See Fed. R. Crim. P.

17(e)(2). Prior to the enactment of Section 3505, prosecutors were thus forced to take the depositions of foreign custodians under Fed. R. Crim. P. 15 to authenticate foreign records. The deposition procedure, which is dependent upon the consent of the foreign government, was time-consuming and very costly.

Contrary to petitioner's contention (Pet. 21-23), Congress's elimination in Section 3505 of a face-to-face confrontation with the custodian of the records due to a perceived need to reduce costs and minimize inconvenience does not render Section 3505 constitutionally infirm. It is well established that the admission at trial of hearsay statements of an unavailable declarant does not offend the Confrontation Clause if the out-of-court statements bear sufficient "indicia of reliability" to assure an adequate basis for evaluating the truth of the declaration. *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 10; *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980); *Dutton* v. *Evans*, 400 U.S. 74, 83-90 (1970). In enacting Section 3505, Congress carefully protected the rights of criminal defendants under the Confrontation Clause by imposing requirements to ensure the admission of only demonstrably reliable evidence. See H.R. Rep. 98-907, 98th Cong., 2d Sess. 3-4 (1984).

As the court of appeals correctly concluded (Pet. App. A7-A10), the custodian's certification under 18 U.S.C. (Supp. IV) 3505 for the admission of foreign business records is sufficiently reliable to pass constitutional muster. Section 3505 requires that foreign business records be authenticated by a custodian of the records or other qualified person. The certification must be executed under circumstances that would expose the maker to criminal penalties if it were falsely made. The certification must also establish that the records are originals or duplicates of original records, and it must establish that the records are

business records within the meaning of Fed. R. Evid. 803(6). Finally, Section 3505 provides that the certified records are not admissible if the source of information or the method or circumstances of their preparation indicate a lack of trustworthiness. And, as the court of appeals pointed out (Pet. App. A10), it is within a defendant's power to depose the recordkeeper to challenge the accuracy of the records. Accordingly, the custodian's certification under Section 3505 provides sufficient guarantees of reliability to satisfy the Confrontation Clause. Cf. *United States* v. *Davis*, 767 F.2d 1025, 1031-1032 (2d Cir. 1985); *United States* v. *Leal*, 509 F.2d 122, 127 (9th Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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